



Commonwealth
of Massachusetts

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Office of Campaign and Political Finance
One Ashburton Place, Room 411
Boston, MA 02108

Advisory Opinion

May 24, 2006
AO-06-06

Lee S. Smith, Devens Counsel
MassDevelopment
33 Andrews Parkway
Devens, MA 01434

Re: Proposed public information effort relating to ballot questions

Dear Mr. Smith:

This letter is in response to your request for an opinion regarding a proposed public information effort concerning redevelopment and disposition of the former Fort Devens, now formally known as the Devens Regional Enterprise Zone (Devens).

In 1994 this office issued an advisory opinion (AO-94-32) stating that public resources could be used by the Massachusetts Government Land Bank¹ to influence *town meeting* votes on a proposed land reuse plan relating to Devens. You have stated that since 1994, substantial redevelopment of Devens has taken place. A formal review of the Reuse Plan that was the subject of the 1994 opinion was required due to redevelopment, as well as the changes in the economy and housing market.

You have also stated that beginning in 2003, elected and citizen representatives of the towns of Harvard, Ayer, and Shirley, the residents and business owners in Devens, the local regulatory board known as the Devens Enterprise Commission (the DEC) and MassDevelopment began a process to examine the question of what should be the ultimate disposition of Devens. This process led to the creation of the Devens Disposition Executive Board (DDEB), an ad hoc committee consisting of representatives of each of the above described parties (collectively, the "Stakeholders"). The DDEB receives and expends public funds under a grant agreement/contract with the Commonwealth.

¹ The Massachusetts Development Finance Agency (MassDevelopment) is the successor agency to the Land Bank. MassDevelopment is a quasi-public state agency that receives and expends public funds pursuant to M.G.L. c. 23G and c. 498 of the Acts of 1993.

Through the “disposition process” involving all of the Stakeholders, the DDEB developed four possible scenarios for disposition ranging from returning all of the land at Devens to the jurisdictions in place prior to the existence of the military installation, to making all of Devens into a new town with its own jurisdiction.

As of February 2006, the Stakeholders and the DDEB agreed to focus their efforts on “the 2B disposition scenario,” under which a recommendation would be made to create a new town and jurisdiction in the main area or “core” of Devens. Jurisdiction of certain “out-parcels” would be transferred to Ayer, Harvard and Shirley.

By agreement of the Stakeholders, votes on a question will occur simultaneously on a date certain in October 2006 at three town meetings, at a caucus of the Devens residents, at a meeting of the DEC and at a meeting of the MassDevelopment Board of Directors. A ballot question in the November 7, 2006 elections will follow in the three towns.

In addition, the Town of Harvard recently decided to place questions seeking public opinion on the disposition scenarios on the warrant for a March 2006 town meeting and at a non-binding referendum on a ballot question, also in March 2006. It is expected that Ayer and Shirley will take similar steps to seek additional public opinion this spring.

You have asked a number of questions, listed below, regarding the extent to which the DDEB and the Stakeholders may provide information to the public about the process that has taken place, the proposed changes and the possible ramifications of votes, and other actions related to the process.

You anticipate that the efforts to disseminate information will be intended to enable voters to make an informed decision on the 2B disposition scenario. To the extent allowed by the campaign finance law, DDEB will take the lead in the preparation or distribution of public information. MassDevelopment may also elect to pay for DDEB’s costs associated with using a public relations firm.

1. GENERAL DISCUSSION

In *Anderson v. City of Boston*, 376 Mass. 178 (1978), the Supreme Judicial Court analyzed the provisions of M.G.L. c. 55 in considering whether a municipality had authority to appropriate and expend funds to influence a ballot question. The court held that M.G.L. c. 55 was a comprehensive campaign finance statute which bars such expenditures since it “demonstrate[s] a general legislative intent to keep political fund raising and disbursing out of the hands of nonelective public employees and out of city and town halls.” *Id.*, at 186-187.

In accordance with *Anderson*, this office has consistently advised that governmental entities may not use public resources to support or oppose ballot questions. Specifically, this office has advised that governmental entities may not distribute flyers, brochures or other material to voters or a class of voters advocating the support or opposition of a ballot question absent express statutory authorization. Even a truly objective flyer including a fair and impartial summary of a ballot question and arguments by proponents and opponents may not be distributed to voters or a class of voters absent statutory authorization. *See* IB-91-01.

In *Anderson*, the court recognized a distinction between appropriating funds and requiring staff to support a public information campaign to influence a ballot question, on the one hand, and speech regarding a ballot question on the other. The court stated that although municipal employees could not be required to devote time during the workday to a public information effort, relating to a ballot question, “individual city employees may have certain rights of speech, even during working hours, concerning [a ballot question.]” 376 Mass. at 199-200.

Anderson, therefore, does not prohibit officials from endorsing a ballot question, or acting or speaking regarding ballot questions, if in doing so they are acting within the scope of their official responsibilities. As noted in IB-92-02, “if appointed officials were prohibited from stating their positions regarding a ballot question related to their official responsibility, such a prohibition would unnecessarily (and probably unconstitutionally) restrain such officials from carrying out the duties of their offices.”

In IB-92-02, the office listed several ways in which officials may speak regarding ballot questions. The bulletin states that an official may, for example, “respond to questions from the press or the public about the official’s position on a ballot question that is within the official’s responsibilities.” Such officials may not however, undertake actions that are inconsistent with his or her official responsibilities or the campaign finance law. For example, officials may not expend public funds to campaign for the ballot question, e.g., by placing an advertisement in a newspaper urging a “yes” or “no” vote on the ballot question, or distribute printed information to voters regarding the ballot question, unless authorized to do so by the Legislature.²

2. QUESTIONS

QUESTION 1: May public funds, including staff time, be used to produce written and printed materials that address (a) issues relating to disposition generally (e.g., background information regarding what has taken place to date regarding the question of what should become of the former Fort Devens property) with no reference to a ballot question, or (b) the subject of a ballot question specifically (e.g., materials discussing the impact of the ballot question)?

ANSWER:

(a) Information relating generally to the disposition process, if distributed primarily for the purpose of influencing a town meeting, the Devens caucus, or meetings of governmental boards, may be produced and distributed using public resources without violating the Massachusetts campaign finance law. As discussed in OCPF Interpretive Bulletin IB-91-01, the campaign finance law does not regulate expenditures of public funds made for the purpose of lobbying town meeting or governmental boards or for other purposes not designed to influence voters at an election.

(b) Regarding the second type of information described in your question, the *preparation* of such materials would appear to be within the scope of responsibility of DDEB and the

² Only six municipalities currently have such authority to distribute informational material: Newton (Chapter 274 of the Acts of 1987), Cambridge (Chapter 630 of the Acts of 1989), Sudbury (Chapter 180 of the Acts of 1996), Burlington (Chapter 89 of the Acts of 1998), Dedham (Chapter 238 of the Acts of 2002), and Lancaster (Sections 285-288 of Chapter 149 of the Acts of 2004). In addition, there is at least one other exception that this office is aware of: M.G.L. c. 43B, § 11, which directs the city council or board of selectmen to distribute the final report of a charter commission to voters.

Stakeholders. Such materials may therefore be prepared and provided to persons upon request. Public funds may *not* be used, however, for a *broad distribution* of documents relating to ballot questions to voters by mail or through other means. *See* IB-92-02.

QUESTION 2: Are there any limitations on making materials that have been prepared with the use of public funds relating to the disposition process or discussing the impact of a ballot question available to any party that requests them?

- a. May they be mailed to a requesting party with public funded postage?

ANSWER: Yes, but only if in response to a specific request.

- b. May they be made available at public meetings relating to disposition?

ANSWER: Yes, materials may be prepared and made available to the extent needed to provide copies for the expected number of persons who will attend meetings.

- c. May persons “opt in” to receive materials through a one-time sign up sheet or similar mechanism? (By signing up, the person would automatically be sent subsequently produced materials).

ANSWER: No. The office has stated that public officials must be careful to refrain from “proactively” distributing information regarding ballot questions. *See* IB-04-01, in which the office stated that officials may not use e-mail to proactively distribute information regarding a ballot question “except in response to a specific request for information.” Creating a system involving the automatic future distribution of such information would involve the proactive use of public resources in a ballot question campaign that would not be consistent with *Anderson*. Public agencies may provide copies of materials relating to a ballot question *only* in response to a specific request for such materials, rather than broad requests for future materials that may or may not be produced.

QUESTION 3: Are there any limitations on posting materials relating to a ballot question on the website of a town or a public agency?

ANSWER: A governmental entity may post public documents relating to a ballot question within the scope of the entity’s official responsibilities, even if the documents contain information regarding the question or state the entity’s position on the question. Given that such documents may be produced and made available upon request, the documents may also be made available to those who visit the governmental entity’s website. *See* AO-00-12.

On the other hand, the website may not be used to post campaign material. For example, a banner on the website that simply says “VOTE YES ON QUESTION 1,” without more, would be considered campaigning. Also, including a link from the public website to a private ballot question committee would similarly be seen as campaigning, and such activity would be outside the scope of the agency’s official responsibilities.

- a. Does the answer to this question change if the materials posted are produced with public funds but the website is privately owned and operated?

ANSWER: No. Public resources may be used to prepare information concerning a ballot question. Such information may be posted not only on a public website, but also on a private website, e.g., a ballot question committee's website, upon the request of the owner of the website. Public resources may not be used, however, to prepare campaign materials, regardless of who distributes the materials.

QUESTION 4: What are the limitations of using public funds to alert people as to how they may actively request further information or otherwise view further information (where the further information is also produced with public funds)? In other words, how may we inform people how they may receive substantive information on the subject of a ballot question? For example, may such an alert be done by (a) unsolicited mail, (b) advertising in a newspaper, (c) posting in a newsletter, (d) inclusion in a letter to the editor of a newspaper, (e) inclusion in a press release, (f) mention to a reporter who includes it in a published article?

ANSWER: Public resources may not be used to distribute letters or press releases (or take other action) if such actions are done in an overly broad manner more consistent with a political campaign and therefore not consistent with the usual practice of a governmental agency. See OCPF's letter issued on August 2, 1996 to the Director of the Division of Fisheries and Wildlife (Case CPF-96-55).³ Therefore, public resources may not be used to send unsolicited mail, or to pay for advertising in a newspaper. In addition, public resources may not be used to create a special edition of a newsletter to focus on a ballot question or to change the scope of distribution of newsletters. Such expenditures would not be consistent with *Anderson*. Public resources may be used, however, to provide information in the remaining ways listed above.

QUESTION 5: Are there established standards or tests to evaluate or determine what is deemed to "discuss the substance of a ballot question" and therefore information that may not be distributed using public resources, e.g., may information be distributed using public resources even if it describes elements of the disposition process?

ANSWER: The office would assess whether a document may be distributed using public resources by considering its content and timing. As discussed in IB-91-01, "because it is not always easy to determine the primary purpose of material distributed before a town meeting and related election, municipal officials *should be careful to avoid any discussion regarding an election* in such material. Even if it does not expressly urge a vote in an election, any discussion regarding an election in a flyer or other document distributed using public resources may raise an inference that the document is being distributed to influence the election." In addition, public resources may not be used to distribute information after the town meetings, the caucus, and board meetings, but before the elections, if the information discusses the impact of a ballot question, even in the absence of a specific reference to the election. See IB-91-01.

QUESTION 6: Would a member of the DDEB who is appointed but not elected be considered a "public official" permitted to discuss matters within his/her official responsibilities as described in IB-92-02?

³ In the Fisheries and Wildlife case, the office found that a "barrage" of press inquiries received by the Division of Fisheries and Wildlife regarding the impact of a ballot question within the Division's area of responsibilities did not justify the distribution of a statement on the impact of the question to more than 2,000 individuals or organizations statewide including 709 members of the press, 304 conservation organizations, 516 sporting goods stores, and 354 city and town clerks. This activity amounted to campaigning for the ballot question, which was not consistent with *Anderson*.

ANSWER: Yes. A member of the DDEB would be able to speak regarding matters within his or her official responsibilities at any time.⁴

QUESTION 7: Are there any limitations regarding holding a press conference to announce matters relating to disposition – specifically, are there limitations on what may be announced, and on the use of staff time to organize or prepare for a press conference or to prepare and distribute press releases?

ANSWER: Public resources may be used to announce the placing of a question on the ballot relating to disposition since disposition appears to be within the official responsibility of the entities described. In addition, staff time may be used to organize and prepare for the conference, or to distribute press releases consistent with the process used in the ordinary course of business of the agencies. Such press conferences may not, however, be political campaign events. For example, they may not be held in conjunction with a campaign rally or coordinated with political committees or other organizations supporting or opposing a ballot question.⁵

QUESTION 8: May public officials prepare and submit “op-ed” articles or letters to the editor of a newspaper regarding the subject of a ballot question?

ANSWER: Yes.

This opinion is limited in scope to providing guidance under that statute and is based on your letter and conversations with OCPF staff. You may also wish to contact the Ethics Commission to determine whether ballot question activity by Board members raises any issues under the state ethics law.

Thank you for your interest in the campaign finance law. Please contact us if you have further questions.

Sincerely,

A handwritten signature in black ink that reads "Michael J. Sullivan". The signature is fluid and cursive, with the first name "Michael" being the most prominent part.

Michael J. Sullivan
Director

MJS/gb

⁴ Public employees may not, however, be required to speak for or provide other services in connection with a ballot question campaign. See M.G.L. c. 55, § 16.

⁵ See also the discussion in response to Question 4.